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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Protecting human rights and fundamental freedoms while countering terrorism

Report of the Secretary-General

Summary

The General Assembly, in resolution 63/185, reaffirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular human rights, refugee and humanitarian law, and called upon States to raise awareness about the importance of these obligations among national authorities involved in combating terrorism. The present report is submitted pursuant to that resolution. It refers to recent developments within the United Nations system in relation to human rights and counter-terrorism, including through the activities of the United Nations High Commissioner for Human Rights, the Human Rights Council and its various special procedures mandates, the human rights treaty bodies, the Counter-Terrorism Implementation Task Force and its Working Group on Protecting Human Rights while Countering Terrorism, the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate. It reports on the consideration by the United Nations human rights system of a number of current issues relating to human rights and counter-terrorism, including the absolute prohibition of torture, detention in the context of countering terrorism, access to justice and the fundamental right to a fair trial, and draws a number of conclusions in this regard.

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I. Introduction

1. The General Assembly, in resolution 63/185, reaffirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular human rights, refugee and humanitarian law. It reaffirmed the obligation of States to respect certain rights as non-derogable in any circumstances, and underlined the exceptional and temporary nature of derogations from the provisions of the International Covenant on Civil and Political Rights. It also reaffirmed that counter-terrorism measures should be implemented in full consideration of the human rights of all and must not be discriminatory, and called upon States not to resort to profiling based on stereotypes founded on grounds of discrimination prohibited by international law. It urged States to fully comply with their obligations with regard to the absolute prohibition of torture and non-refoulement, and to ensure that guidelines and practices in all border control operations and other pre-entry mechanisms are clear and fully respect their obligations under international law towards persons seeking international protection.

2. Further, the General Assembly urged States to take all steps necessary to ensure that persons deprived of their liberty benefit from the guarantees to which they are entitled under international law, including the review of the detention and fundamental judicial guarantees, and opposed any form of deprivation of liberty that amounts to placing a detained person outside the protection of the law. It called upon States to ensure that their laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, and recognized the need to continue ensuring that fair and clear procedures under the United Nations terrorism-related sanctions regime are strengthened to make them more efficient, transparent and human rights compliant. It also urged States to include adequate human rights guarantees in their national listing procedures.

3. The General Assembly encouraged States, while countering terrorism, to take into account relevant United Nations resolutions and decisions on human rights, and encouraged them to consider the recommendations of the special procedures and mechanisms of the Human Rights Council and the relevant comments and views of United Nations human rights treaty bodies. It encouraged the Security Council and the Counter-Terrorism Committee to develop cooperation with the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. It called upon States and other actors to continue to implement the United Nations Global Counter-Terrorism Strategy, and requested OHCHR and the Special Rapporteur to continue to contribute to the work of the Counter-Terrorism Implementation Task Force, including by raising awareness about the need to respect human rights while countering terrorism.

4. I was requested to submit a report on the implementation of resolution 63/185 to the General Assembly at its sixty-fourth session. The present report also responds to the request of the former Commission on Human Rights for the High Commissioner to report to the General Assembly on the implementation of Commission resolution 2005/80.

5. In my previous report (A/63/337), I focused on a number of key thematic issues, relating to States' obligations and responsibilities under international human

rights law within the context of counter-terrorism measures, the scope and justification for derogatory measures and limitations, as well as some considerations relating to the right to a fair trial in the context of countering terrorism. The present report refers to recent developments within the United Nations system in relation to human rights and counter-terrorism, including through the activities of the United Nations High Commissioner for Human Rights, OHCHR, the Human Rights Council and its various special procedures, the human rights treaty bodies, the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate, and the Counter-Terrorism Implementation Task Force and its Working Group on Protecting Human Rights while Countering Terrorism. This report follows the same structure as the reports submitted to the General Assembly at its sixty-first (A/61/353) and sixty-second (A/62/298) sessions. In order to continue to provide an overview of the main activities of the human rights system in the field of human rights and counter-terrorism, this report includes major developments since August 2007.[1]

II. Recent developments in the United Nations in the area of human rights and counter-terrorism

United Nations Global Counter-Terrorism Strategy and the Counter-Terrorism Implementation Task Force

6. The United Nations Global Counter-Terrorism Strategy was adopted by the General Assembly on 8 September 2006 (resolution 60/288). Through the Strategy and plan of action, which was reaffirmed by the Assembly on 5 September 2008 (resolution 62/272), all Member States agreed on a coordinated and comprehensive response to terrorism, including the promotion and protection of human rights for all and respect for the rule of law as essential to all components of the Strategy. Member States recognized that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.

7. The Strategy gives support to the practical work of the Counter-Terrorism Implementation Task Force, which I established in July 2005 to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system. The Task Force currently hosts eight working groups. On 3 March 2009, the Task Force and its working groups briefed the General Assembly on its activities, as requested by the General Assembly in resolution 62/272.

8. In order to assist States in implementing the human rights aspects of the Strategy, in particular those contained in the fourth pillar of the Strategy, entitled "Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism", the Task Force has formed the Working Group on Protecting Human Rights while Countering Terrorism, which is led by OHCHR. Other members include the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the United Nations Office on Drugs and Crime, the Counter-Terrorism Committee Executive Directorate, the Office of Legal Affairs, the United Nations Interregional Crime and Justice Research Institute, the World Bank, the International

[1] The end of the reporting period of A/62/298.

Maritime Organization and the Security Council Committee established pursuant to resolution 1267 (1999). The Office for the Coordination of Humanitarian Affairs participates as an observer.

9. The Working Group supports efforts by Member States to ensure the promotion and protection of human rights in the context of counter-terrorism. It was agreed that, to this end, the Working Group would assess the support and assistance currently given to Member States to ensure the promotion and protection of human rights in the context of counter-terrorism, identify possible gaps and weaknesses, develop proposals for strengthening support to Member States, facilitate an exchange of information on critical human rights concerns, as well as "good practice" examples, drawing on experience at the national and regional levels; and provide guidance, including by developing practical tools to assist Member States in strengthening the protection of human rights in the context of counter-terrorism.

10. In November 2008, the Working Group organized an Expert Seminar which focused on the impact of terrorism and counter-terrorism measures on the enjoyment of economic, social and cultural rights. It gathered a number of experts from all regions, OHCHR representatives, and some members of the Working Group. Experts reviewed States' legal obligations in the field of economic, social and cultural rights in relation to terrorism and counter-terrorism measures before examining the impact of terrorism and counter-terrorism measures on the enjoyment of those rights, as well as the link between economic, social and cultural rights and civil and political rights as indivisible rights. Experts discussed means of monitoring the effect of counter-terrorism measures on economic, social and cultural rights and ways to prevent violations. Finally, they focused on the linkage between conditions conducive to terrorism and the inadequate fulfilment of economic, social and cultural rights. A number of concrete recommendations and suggestions were made at the Seminar, which will inform the ongoing work of the Working Group as well as provide input for the development of policy guidance and recommendations for the promotion and enhancement of the protection of economic, social and cultural rights in the context of countering terrorism when providing assistance and advice to Member States.[2]

11. The Working Group also started developing a series of basic technical reference guides to assist Member States in strengthening the protection of human rights in the context of counter-terrorism in 10 specific areas where additional human rights guidance may be useful. Following consultations with Member States, the first four basic technical reference guides being developed are on the proscription of organizations, stopping and searching of persons, designing security infrastructure, and the principle of legality in national counter-terrorism measures. Finally, on 28 May 2009, the Working Group provided a briefing on its past and planned activities to all interested Member States, which was followed by an interactive dialogue.

12. OHCHR and the Special Rapporteur are also members of other Task Force working groups, namely those on integrated assistance for countering terrorism, supporting and highlighting victims of terrorism, and countering the use of the Internet for terrorist purposes. In addition, OHCHR is a member of the Working

[2] For more details, see the summary at http://www.un.org/terrorism/pdfs/wg_protecting_human_rights.pdf.

Group on Preventing and Resolving Conflicts. In these working groups, OHCHR and the Special Rapporteur contribute to raising awareness of human rights challenges as well as mainstreaming human rights within the Task Force.

Counter-Terrorism Committee/ Counter-Terrorism Committee Executive Directorate

13. The Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate continue to take relevant human rights concerns into account in their work programmes focused on the implementation of Security Council resolutions 1373 (2001) and 1624 (2005). By its resolution 1805 (2008), the Security Council decided to conduct an interim review of the Executive Directorate by 30 June 2009. The review summarized the human rights activities of the Committee and the Executive Directorate. It noted that they have both maintained good cooperation with OHCHR, including in developing technical assistance for States in the field of human rights. The review also referred to the active dialogue that has taken place with the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. It welcomed the activities of the Executive Directorate in the human rights field and encouraged it to further develop them, "within the guidance of the Committee, by deepening its analytical framework, including through participation by the Executive Directorate in the Counter-Terrorism Implementation Task Force working group on protecting human rights while countering terrorism" (S/2009/289, para. 31).

Human Rights Council

14. During the period covered by the present report, the Human Rights Council adopted three key resolutions on the protection of human rights and fundamental freedoms while countering terrorism. In resolutions 7/7 and 10/15, of 27 March 2008 and 26 March 2009 respectively, the Council inter alia reaffirmed the non-derogability of certain rights in all circumstances, as well as the exceptional and temporary nature of derogations. The Council reaffirmed that counter-terrorism measures should take into consideration the human rights of minorities and must not be discriminatory. It highlighted that profiling must not be based on stereotypes founded on discriminatory grounds. It called upon States to ensure access to an effective remedy where human rights are violated as a result of counter-terrorism measures, and provide adequate, prompt and effective reparations for victims. The Council recalled the absolute prohibition of torture and urged States to respect their non-refoulement obligations. The Council also recalled the right to be equal before courts and tribunals, and urged States to guarantee due process and respect the safeguards concerning the liberty, security and dignity of the person. The Council called upon States to ensure that counter-terrorism legislation is accessible, precise, non-discriminatory, non-retroactive and in accordance with international law, and urged States to include adequate human rights guarantees in national listing and de-listing procedures. In addition, the Council urged States to protect all human rights while countering terrorism, including economic, social and cultural rights. By resolution 6/28 of 14 December 2007, the Council extended for three years the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

15. Another important development in the period covered by the present report is the new universal periodic review, which the Human Rights Council has recognized

as a tool for the promotion and protection of human rights and fundamental freedoms while countering terrorism (resolution 10/15). In 2006, the General Assembly decided in resolution 60/251 that the Human Rights Council should undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States. The universal periodic review, which covers 48 States each year and by the end of 2011 will have covered all Member States, offers another opportunity to incorporate human rights into global counter-terrorism efforts.

16. During the reviews of 80 Member States, held during the first five sessions of the Human Rights Council Working Group on the Universal Periodic Review in 2008 and 2009, a number of concerns were related to the protection of human rights and fundamental freedoms in the context of countering terrorism. States were recommended to, inter alia, review and ensure that national legislation and policies on counter-terrorism comply with international human rights law and international humanitarian law.[3] Attention was directed to the definition of terrorism and terrorist groups. Concerns were raised about the vagueness and broadness of the provisions in the different national counter-terrorism laws. Recommendations in this respect encouraged States to define acts of terrorism in a precise and narrow manner, and in compliance with international human rights law and international humanitarian law. Other recommendations concerned the rule of law and due process, including the right to a fair trial and limitations on pre-charge detention of persons suspected of terrorism, the right to freedom and security of the person, the right to legal assistance and the need to address the effects of counter-terrorism legislation on the operation of human rights defenders.[4] Recommendations were also made to States to counter terrorist-funding efforts in their territories in accordance with Security Council resolutions, and to organize human rights training for law enforcement authorities in charge of combating terrorism.[5] A number of recommendations were also made to encourage States to take action on their treaty obligations, strengthen cooperation with other human rights mechanisms, including reporting to treaty bodies and invitations to special procedures, and implement the recommendations on related themes of those mechanisms.[6] The background documentation, which provided the basis of the reviews, also included information on a number of thematic issues on human rights and counter-terrorism.[7]

Special procedures of the Human Rights Council

17. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism continued to examine a number of specific and emerging issues of importance to his mandate, through his thematic

[3] See A/HRC/10/76, para. 100.30; A/HRC/8/31, para. 78.29; A/HRC/8/42, para. 106.25; A/HRC/8/46, para. 39 (c); A/HRC/8/25, para. 56.6; and A/HRC/10/83, para. 106.23.

[4] See A/HRC/8/31, para. 78.29; A/HRC/8/25, para. 56.10; and A/HRC/8/42, para. 106.22.

[5] See A/HRC/8/48, para. 63.14; and A/HRC/10/75, para. 91.16.

[6] See A/HRC/8/29, para. 69.10; A/HRC/8/47, para. 60.22; A/HRC/10/76, para. 100.30; A/HRC/8/28, para. 58.3; and A/HRC/8/21, para. 83.12.

[7] The review is based on information prepared by the State concerned, which takes the form of a national report, as well as two reports prepared by OHCHR, i.e. a compilation of United Nations information and a summary of stakeholders' input. All documentation regarding the universal periodic review can be accessed at http://www.ohchr.org/EN/HRBodies/UPR.

reports to the General Assembly and the Human Rights Council, as well as his reports on communications with Governments and responses thereto. In addition, the Special Rapporteur reported in 2008 on his country visits to Spain and South Africa.

18. In his latest report to the Human Rights Council (A/HRC/10/3), the Special Rapporteur discussed the role of intelligence agencies in the fight against terrorism. Highlighting the fact that the collection and sharing of "signal" and "human" intelligence had led to violations of the prohibition against torture and other inhuman treatment, as well as of the right to privacy and the principle of non-discrimination, he stressed the need for a specific and comprehensive legislative framework to regulate the broader powers that have been given to intelligence agencies in the aftermath of the terrorist attacks of 11 September 2001. He also examined the more specific challenges that increased cooperation between intelligence agencies have posed and clarified the human rights obligations of States when their intelligence agencies perform joint operations, participate in interrogations and send or receive intelligence for operational use. In addition, the Special Rapporteur focused on the best practices of different oversight bodies, and emphasized that domestic State secrecy or public interest immunity clauses cannot disregard the positive obligations of States under human rights law to conduct independent investigations into severe human rights violations and provide the victims of those violations with an effective remedy.

19. In his report to the Human Rights Council at its sixth session (A/HRC/6/17 and Corr.1), the Special Rapporteur had focused on the impact of counter-terrorism measures on the enjoyment of economic, social and cultural rights, such as the impact of physical obstacles constructed for security reasons on access to health care, education and work. He highlighted the detrimental impact of measures taken in the name of countering the financing of terrorism on charitable and humanitarian organizations in their promotion of economic, social and cultural rights, as well as the impact of counter-terrorism measures on indigenous and minority communities, including the destruction of their means of livelihood, forced evictions and internal displacement. Finally, the Special Rapporteur focused on the role of the promotion of economic, social and cultural rights in addressing and countering the conditions conducive to the spread of terrorism which, he noted, needed to be included in the formulation of long-term sustainable counter-terrorism strategies.

20. In his report to the General Assembly at its sixty-third session (see A/63/223), the Special Rapporteur addressed issues linked to the fundamental right to a fair trial in the specific context of prosecuting terrorist suspects. Following an overview of the applicable legal framework — in which he stressed that fundamental principles such as the right to a fair trial may not be subject to derogation and that any derogation must not circumvent the protection of non-derogable rights — the Special Rapporteur examined the role of the judiciary in ensuring that terrorist suspects who are detained pursuant to criminal law provisions, subject to "administrative detention" or detained during the course of participating in hostilities have effective access to courts. The Special Rapporteur also emphasized that the independence and impartiality of the judiciary are key. In his report he addressed military courts or tribunals or other special courts, and pointed out that the fact that often judges are serving (military) officers appointed by the executive, and the broad discretional power of the executive to refer cases to such courts, lead to serious questions concerning the independence and impartiality of such courts,

even where instructions are given to members of a court that they are to act independently. He was concerned about cases where the executive has broad discretionary powers either to refer terrorist suspects to military or special courts, or to review or confirm the decisions of those courts, which gives the executive the ultimate control over the accused and the outcome of the trial.

21. He also discussed access to justice in the context of listing and de-listing procedures. He emphasized important elements of a fair hearing, and voiced concern about cases where a trial can lead to the imposition of the death penalty.

22. In his thematic report to the General Assembly at its sixty-second session (see A/62/263), the Special Rapporteur focused on the challenges to refugee law caused by counter-terrorism measures. In this context, his concerns were related to pre-entry interception and screening measures related to border control; detention of asylum-seekers and shortcomings in securing court review of such detention; exclusion from refugee or other protection status; the application and non-derogability of the principle of non-refoulement; the return, repatriation or resettlement of rejected asylum-seekers, including persons detained for terrorism-related reasons; the use of so-called diplomatic assurances; and strengthening global responsibility for international protection as an inherent part of a comprehensive counter-terrorism strategy.

23. The Special Rapporteur also conducted several country visits in 2008 and 2009. From 7 to 14 May 2008, the Special Rapporteur carried out an official visit to Spain, where he reported on the provisions on terrorism in Spanish law in the light of the principle of legality, aspects linked to the trial of those accused of the bombings of 11 March 2004 and the use of incommunicado detention (see A/HRC/10/3/Add.2).

24. From 17 to 21 April 2009, the Special Rapporteur carried out an official mission to Egypt. To date, he has not reported to the Human Rights Council on the outcome of his visit, but has issued a press release which highlighted his engagement with officials and experts regarding a counter-terrorism law that is intended to replace the state of emergency scheduled to end on 28 May 2010.

25. Other special procedures mandate holders have addressed a broad range of issues related to the impact of terrorism on human rights, within the context of their mandates and with due consideration for the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, by sending urgent appeal letters, issuing press releases, preparing thematic studies and conducting country visits. The following paragraphs provide examples of their recent activities.

26. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment also continued to address issues related to the protection of human rights in the context of countering terrorism. In his report following his country visit to Denmark (A/HRC/10/44/Add.2), he expressed concern about cases where cooperation between various intelligence services — a necessary feature of the global fight against terrorism — involves the use of diplomatic assurances or extraordinary renditions. The Special Rapporteur recalled that, in his view, diplomatic assurances are attempts to circumvent the absolute prohibition of torture and non-refoulement, that they are unreliable and ineffective, and that they should not be resorted to where there are substantial grounds for believing that a person

would be in danger of being subjected to torture or ill-treatment upon return. He also encouraged efforts to develop a common European policy or approach aimed at improving the conditions of detention and the situation of torture and ill-treatment in potential countries of return.

27. The Special Rapporteur on the independence of judges and lawyers also highlighted a number of concerns in the context of counter-terrorism (see A/63/271). Focusing on states of emergency, he highlighted that experts at a seminar on the theme "The protection of human rights under states of emergency, particularly the right to a fair trial" had, in December 2007, noted that an increasing number of States have adopted laws to counter terrorism which allow for limitations on human rights that may be more drastic than those adopted during a state of emergency, and disregarded the conditions imposed by international law regarding derogations, sometimes even suspending non-derogable rights. The Special Rapporteur recalled that specific counter-terrorism legislation is often the basis for the setting-up of parallel systems for the administration of justice, and usually allows incommunicado detention for several days. He also noted that terrorism suspects often do not have the right to consult a lawyer of their choice, especially in police detention, and their assigned counsel do not fully perform their role of providing competent and effective legal assistance. He also added that detention and trials related to terrorism raise special concerns about judicial procedures.

28. In his report for 2008 to the Human Rights Council (A/HRC/7/14), the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression addressed counter-terrorism in the context of legal restrictions on freedom of opinion and expression. He highlighted the fact that recent counter-terrorism and national security legislation has often resulted in violations of the right to freedom of opinion and expression, which was particularly vulnerable to legislation that de facto legitimates limitations on the free circulation and expression of ideas and opinions, directly affecting the work of media professionals, human rights defenders, political groups and civil society more broadly. Journalists and media professionals have become common targets of unlawful attempts to restrict freedom of expression. Counter-terrorism legislation often restricts the right to freedom of opinion and expression by banning the publication of information that is, without justification, defined as being threatening to national security; forcing the disclosure of journalistic sources; or censoring media outlets and journalists on the basis of an alleged proximity to terrorist or rebel groups. States have also adopted measures in which national security is used as justification to allow for direct attacks against the free media, investigative journalism, political dissidence, and human rights monitoring and reporting, as well as cases where peaceful actions or demonstrations have been considered terrorist acts by certain Governments, thereby suppressing dissent.

29. The Special Rapporteur on freedom of religion or belief examined specific issues raised by counter-terrorism measures in the context of freedom of religion. Following her visit to the United Kingdom of Great Britain and Northern Ireland from 4 to 15 June 2007, she highlighted allegations of abuse of counter-terrorism laws which she reported are largely perceived by the population to target specific religious groups, including through the screening of their personal data, house searches, interrogations and arrests solely because of religious affiliation, as well profiling techniques based on physical appearance. She stated that the alienation of certain ethnic and religious groups may also have negative implications for law

enforcement efforts and for the gathering of counter-terrorism intelligence (see A/HRC/7/10/Add.3).

30. Special procedures mandate holders issued two press releases in relation to the closure of the Guantanamo Bay detention facility. On 22 December 2008, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health welcomed the statement by the President-elect of the United States of his intention to close the Guantanamo Bay detention facility and to strengthen the fight against torture. They urged the United States Government to fully respect its international human rights obligations, notably the principle of non-refoulement, and not to transfer individuals to third countries for continued detention at its behest (proxy detention). They also stressed that those detainees facing criminal charges must be provided with fair trials before courts that afford all essential judicial guarantees. They emphatically rejected any proposals that Guantanamo detainees could, through new legislation, be subjected to administrative detention, as this would only prolong their arbitrary detention. They urged that all secret places of detention be closed and that persons detained therein be given due process. Further, they called on third countries to facilitate the closure through their full cooperation in resettling those Guantanamo detainees who cannot be sent back to their countries of origin. On 23 January 2009, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture issued a press release in which they welcomed the signing by the President of the United States of executive orders, which set a timeline for the closure of the Guantanamo Bay detention centre and required the Central Intelligence Agency to shut its secret detention facilities.

31. A number of joint initiatives were undertaken by special procedures mandate holders during the period covered by this report. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances have initiated a joint study to examine the practice of secret detention from a global perspective. The joint study aims to produce new findings regarding the nature and scope of secret detention practices. It will examine the practice or permission of secret detentions which operate on the territories of States in various geographical regions, taking into account domestic, regional and global efforts to counter terrorism. In addition to thematic reporting on facts and events, the joint study will also include a legal analysis of the framework within which secret places of detention operate, and findings as to the extent to which persons have been tortured or subjected to cruel, inhuman or degrading treatment or punishment, arbitrarily detained or subjected to enforced or involuntary disappearance at such places. It is expected that the four mandate holders will produce a joint report containing recommendations regarding these practices, aimed at curbing the resort to secret detention and the unlawful treatment of detainees in the context of contemporary counter-terrorism efforts.

32. During the reporting period, the Working Group on Arbitrary Detention focused on a number of issues of concern in the context of measures taken by States

in countering terrorism, in its annual reports, its country visit reports and its opinions adopted on individual cases of alleged arbitrary detention. By way of example, the Working Group examined the issue of extended periods of preventive detention, in the absence of charges or trial, by States invoking emergency laws or in the context of countering terrorism, as well as cases of continuing detention despite court decisions ordering release, where the ruling was simply disregarded or where new warrants of administrative detention were issued and carried out or where such arrests were carried out without a warrant. The Working Group dealt with cases pursuant to special powers invoked by States and usually only attached to states of emergency, such as administrative detention orders alleged to have been carried out for security reasons, and cases of detention for security reasons where the individual did not have access to the secret evidence used against him. The Working Group also examined the situation of immigrants deemed to pose a terrorist threat, as well as detention following trials in special courts lacking fair trial guarantees (A/HRC/7/4). Following up on these concerns, the Working Group set out a list of principles which should be considered by States in relation to the deprivation of liberty of persons accused of acts of terrorism, in conformity with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (A/HRC/10/21). In addition, in the context of its visits to Italy, Mauritania and Norway, the Working Group addressed issues relating to the deportation of alleged terrorists to States where they are at substantial risk of arbitrary detention and torture in violation of the principle of non-refoulement, administrative deportation orders which lack effective remedies against a risk of torture or arbitrary detention in the country of destination (A/HRC/10/21/Add.5), access to information to challenge the legality of detention or of the rejection of applications for early release or for the termination of a preventive detention term of, inter alia, alleged terrorists (A/HRC/7/4/Add.2), and the principle of legality in the definition of terrorist acts (A/HRC/10/21/Add.2). Finally, in a key opinion relating to the detention of eight individuals in the case of the terrorist attack in which the Prime Minister of Lebanon, Rafiq Hariri, was killed, the Working Group concluded that the detention for more than two years, without charges and without tangible prospect of a trial without undue delay, was arbitrary (A/HRC/10/21/Add.1, opinion 37/2007).

Human rights treaty bodies

33. The Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination have continued to examine the compliance of States parties to the treaties with their legal obligations to respect human rights in the context of countering terrorism. They provided, in their concluding observations, recommendations that contribute to ensuring such compliance.

34. Recurring issues of concern to the Committees include wide and ill-defined national definitions of terrorism[8] which may give rise to interpretations whereby the legitimate expression of the rights established under the International Covenant on Civil and Political Rights can be sanctioned as terrorist acts or that allow charges of terrorism to be brought against members of certain groups, minorities, indigenous

[8] See CCPR/C/ESP/CO/5 (2009), para. 10, and CAT/C/DZA/CO/3 (2008), para. 4.

groups, or for political, religious or ideological reasons.[9] Another major issue of concern is infringements on the absolute prohibition of torture.[10] This prohibition is jeopardized by the continuing use of memoranda of understanding and diplomatic assurances as well as cooperation with foreign intelligence agencies known to resort to torture, extraordinary rendition and secret places of detention and incommunicado detention.[11] The Human Rights Committee expressed the view that such practices are not necessary and may not be justified by "the interests of justice". The Committees also addressed the length of detention for terrorism-related cases, including the extension of the period of detention without charge of terrorist suspects, and extended pre-charge detention and notification requirements to children suspected or charged with terrorism offences;[12] the right to have access to a freely chosen lawyer, which constitutes a fundamental safeguard against ill-treatment; safeguards of due process and fair trial, including non-disclosure of information in the course of proceedings, based on the reasoning that it could cause injury to international relations, national defence or national security; measures taken against immigrants, refugees and asylum-seekers on grounds of national security and countering terrorism, such as their arrest, detention, including mandatory detention of foreign nationals, expulsion in disregard of human rights and refugee law; racial profiling and discrimination[13] and limitations to the right to privacy,[14] including through wiretapping for investigations.[15]

35. In a specific case, the Human Rights Committee addressed the national implementation of the sanctions regime set out by the Security Council in its resolution 1267 (1999) in the case of *Nabil Sayadi and Patricia Vinck v. Belgium*.[16] The two complainants, Belgian nationals, had been placed on the lists appended to United Nations resolution 1267 (1999) in January 2003, on the basis of information which had been provided to the Security Council by Belgium, shortly after the commencement of a domestic criminal investigation, in September 2002. They submitted several de-listing requests at the national, regional and United Nations levels, to no avail. In 2005, a Belgian court of first instance ordered the Belgian State to, inter alia, urgently initiate a de-listing procedure with the United Nations sanctions Committee, which was done by the responding State. At the time of the examination by the Human Rights Committee, the individuals had been on the sanctions list for more than five years. The individuals complained that they had not been given access to the "relevant information" justifying their listing, had not been

[9] See CCPR/C/GBR/CO/6 (2008), paras. 26 and 16.

[10] CAT/C/DZA/CO/3 (2008), paras. 4, 5, 7 and 20; CAT/C/AUS/CO/3 (2008), para. 10; CAT/C/KEN/CO/1 (2009), para. 17; CAT/C/PRT/CO/4 (2008), para. 9; CAT/C/CHN/CO/4 (2008), para. 37; CAT/C/RUS/CO/4 (2007), paras. 8 and 24; CAT/C/KAZ/CO/2 (2008), paras. 15 and 8; CAT/C/MKD/CO/2 (2008), paras. 9 and 16; CCPR/C/FRA/CO/4 (2008), para. 14; CCPR/C/GBR/CO/6 (2008), para. 12; CCPR/C/ESP/CO/5 (2009), para. 14; CCPR/C/TUN/CO/5 (2008), para. 15; CCPR/C/IRL/CO/3 (2008); para. 11; and CCPR/C/DZA/CO/3 (2007), para. 17.

[11] See CCPR/C/GBR/CO/6 (2008), paras. 15, 19 and 29; CCPR/C/FRA/CO/4 (2008); CCPR/C/LBY/CO/4 (2007), para. 12; and CCPR/C/MCO/CO/2 (2008), paras. 11 and 12.

[12] See CRC/C/GBR/CO/4 (2008), para. 77; and CRC/C/CHL/CO/3 (2007), para. 48.

[13] See CERD/C/USA/CO/6 (2008), paras. 14 and 24; CERD/C/CAN/CO/18 (2007), para. 14; CERD/C/MKD/CO/7 (2007), para. 12; CCPR/C/GBR/CO/6 (2008), para. 29; and CCPR/C/CHL/CO/5 (2007), para. 7.

[14] See CCPR/C/SMR/CO/2 (2008), para. 13.

[15] See CCPR/C/ESP/CO/5 (2009), para. 11.

[16] Communication No. 1472/2006.

prosecuted or convicted, had a clean judicial record, and had not been charged with an offence, but that the freezing of all their financial assets prevented them from working, travelling, moving funds and defraying family expenses.

36. The Human Rights Committee noted that the travel ban resulted from the transmittal by Belgium of the individuals' names to the sanctions committee, before the authors had been heard. Even though Belgium was not competent to remove the authors' names either from the United Nations or the European lists, it was responsible for the presence of the authors' names on the lists, and for the resulting travel ban. The Human Rights Committee found a violation of the authors' right to freedom of movement under article 12 of the International Covenant on Civil and Political Rights, because both the dismissal of the criminal investigation and the State party de-listing requests showed that the restrictions were not necessary to protect national security or public order. The Committee also found an unlawful attack on the authors' honour and reputation (protected by article 17 of the Covenant) based, inter alia, on the accessibility of the list on the Internet, a number of press articles, the transmittal of the information about the authors prior to the conclusion of the criminal investigation, and the fact that, despite the State party's requests for removal, the authors' names and contact data are still accessible to the public on United Nations, European and State party lists.

37. The Human Rights Committee stated that, although the State party itself was not competent to remove the authors' names from the sanctions Committee's list, it had the duty to do all it could to have their names removed as soon as possible, to provide the authors with compensation, to make public the requests for de-listing, and to ensure that similar violations do not occur in the future. This decision was followed by six individual opinions of Committee members, both on admissibility and on the merits.

38. On 20 July 2009, Nabil Abdul Salam Sayadi and his wife Patricia Vinck were removed from the Consolidated List pursuant to a decision of the Committee established pursuant to resolution 1267 (1999).

III. Activities of the United Nations High Commissioner for Human Rights and her Office

United Nations High Commissioner for Human Rights

39. In carrying out her mandate, the United Nations High Commissioner for Human Rights has continued to examine the question of the protection of human rights and fundamental freedoms while countering terrorism and to make general recommendations about the obligations of States in this regard. Key issues of concern included the erosion of the absolute prohibition of torture in the context of countering terrorism and the attempts to circumvent safeguards included in the right to a fair trial.

40. Following the High Commissioner's welcoming of the decision to close the Guantanamo Bay detention centre,[17] she noted, in her statement to mark the International Day in Support of Victims of Torture in June 2009, the devastating impact of the terrorist attacks of 11 September 2001 on the fight to eliminate torture,

[17] Press release, 22 January 2009.

highlighting in particular the fact that States had become less scrupulous in their approach to torture, and even looked for ways to circumvent the Convention against Torture. She recalled the absolute prohibition of torture and highlighted that responsibility for the violation of this absolute prohibition could extend to the torturers themselves, the policymakers, as well as the public officials who defined the policy or gave the orders. She also recalled the absolute prohibition of refoulement, and urged States to ratify the Convention against Torture and to ensure that they abide by the very clear rules it contains. Focusing on extraordinary renditions and secret places of detention, she noted that those that are held in detention must either be tried by courts of law or released if they have not been found guilty of any crime, as continuing, indefinite or other forms of detention would be illegal under international human rights law. During the reporting period (see A/HRC/8/13), she also recalled her position that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment, nor do they nullify the obligation of non-refoulement which continues to apply at all times, and that efforts to eradicate torture must focus primarily on prevention, including through the establishment of systems of regular monitoring of places of detention by independent international and national bodies. She urged States to ratify the Optional Protocol to the Convention against Torture.

41. A second and related issue of concern to the High Commissioner is the continuing reluctance of some States to ensure access to courts after arrest and to abide by the right to a fair trial, a fundamental principle of human rights law, in the context of countering terrorism. In response to attempts by some States to keep terrorism suspects in prolonged, sometimes indefinite detention, or to submit them to trial by special or military courts on the basis of the argument that human rights guarantees are inappropriate to deal with the exceptional nature of terrorism, the High Commissioner recalled her view that acts of terrorism are fundamentally criminal acts in nature. As such, States should ensure that all guarantees of fair trial and due process are respected at all stages — from the arrest to the outcome of the trial — as these are procedural means to safeguard the rule of law. In the context of countering terrorism, special attention should be paid to access to courts after arrest. Moreover, detention should remain the exception, not the rule; evidence used should not have been collected through means of torture or other ill-treatment, including in the case of confessions; the accused needs to have access to the evidence that will be used as well as to witnesses, if any. Finally, a fair trial can be conducted only where the court is independent and impartial. Trials of civilians by military or special courts are not prohibited in all circumstances, but should be exceptional. The High Commissioner also recalled her position that only in rare circumstances will a military court be the appropriate venue to try a civilian terrorist suspect.

Other developments

42. OHCHR organized a number of meetings which focused on various aspects of human rights and counter-terrorism. From 27 to 29 October 2008, OHCHR organized a regional seminar for the Middle East and North Africa region on upholding human rights while countering terrorism, in Amman. The seminar gathered key partners in the region to initiate a dialogue on human rights obligations and commitments of States in matters related to counter-terrorism. On 30 April 2009, OHCHR organized a seminar on human rights and counter-terrorism in Dushanbe. Judges, lawyers and non-governmental organizations from different

regions of Tajikistan were invited to discuss key human rights obligations and the commitment of States in matters relating to counter-terrorism, as well as to identify the challenges in ensuring that measures taken to counter terrorism comply with States' obligations under human rights law.

43. During the fifth special meeting of the Counter-Terrorism Committee, on the theme "Prevention of terrorist movement and effective border security", which was held in Nairobi from 29 to 31 October 2007 and gathered a number of international, regional and subregional organizations, OHCHR delivered a presentation raising human rights concerns relating to the treatment and screening of individuals when crossing an internationally recognized State border, focusing on the use of diplomatic assurances and State responsibility for violation of the principle of non-refoulement. On 3 and 4 April 2008, OHCHR participated in the sixth Conference on Counter-Terrorism of the Asia-Europe Meeting (ASEM), on the theme "Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism", which was held in Spain, and was co-hosted by Spain and Indonesia. ASEM conferences aim to promote an exchange of knowledge, experiences and techniques on countering challenges from terrorism. The purpose of the meeting was to strengthen dialogue and mutual cooperation between Asia and Europe by engaging a dialogue among the relevant political authorities and experts on counter-terrorism. Finally, on 19 and 20 May 2009, OHCHR participated in the expert meeting organized by the Government of Denmark in cooperation with the United Nations Office on Drugs and Crime, in Copenhagen. The two-day meeting was to honour the sixtieth anniversary of the Universal Declaration of Human Rights. The meeting examined and discussed the various aspects of, and challenges posed by, the international obligation to bring suspected terrorists to justice with due respect for human rights and fundamental freedoms and its interplay with different areas of international law (human rights law, refugee law and the Security Council sanctions regime against Al-Qaida and the Taliban).

44. OHCHR has also contributed to the work of the United Nations Office on Drugs and Crime in the delivery of a specialized training programme for judges and prosecutors in combating terrorism. The Office also participated in a seminar organized jointly by the United Nations Office on Drugs and Crime and Spain on terrorism and human rights. It discussed national legal frameworks for countering terrorism, and provided input related to the compliance of national counter-terrorism measures with States' obligations under international human rights law, international humanitarian law and refugee law.

45. During the reporting period, OHCHR worked closely with civil society, notably through its participation in several workshops co-sponsored by Costa Rica, Japan, Slovakia, Switzerland and Turkey, with the support of the Center on Global Counterterrorism Cooperation. The workshops aimed at addressing the United Nations engagement with regional, subregional and functional bodies and civil society on implementing the United Nations Global Counter-Terrorism Strategy. The workshops discussed the international process of global counter-terrorism cooperation and the role that stakeholders can play in furthering the implementation of the United Nations Strategy and what steps the United Nations — in particular the Counter-Terrorism Implementation Task Force — might take to stimulate this engagement. OHCHR also participated in several workshops sponsored by civil society in Ethiopia and South Africa.

IV. Conclusions

46. The United Nations human rights system continues to address the question of the protection of human rights and fundamental freedoms while countering terrorism with a view to assisting Member States in abiding by their international human rights obligations while effectively combating terrorism.

47. The United Nations Global Counter-Terrorism Strategy is an important development in ensuring a coordinated and comprehensive response to terrorism at the national, regional and global levels. With the support of the members of the Counter-Terrorism Implementation Task Force, including OHCHR and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Member States should continue to implement the Strategy, which considers respect for human rights and the rule of law to be the fundamental basis of the fight against terrorism. Member States should also continue to support the work of the Task Force Working Group on Protecting Human Rights while Countering Terrorism, which is led by OHCHR.

48. States must ensure respect for all rights, in particular non-derogable rights, such as the right to life and the prohibition of torture. The United Nations High Commissioner for Human Rights, human rights treaty bodies and various special procedures mandate holders of the Human Rights Council have continued to express grave concerns regarding extrajudicial killings and summary executions, the use of torture and the alleged use of secret detention centres.

49. Member States should reaffirm their commitment in national law to the total prohibition of torture and the prosecution of those responsible for inflicting torture and ill-treatment; and prohibit the use of statements extracted under torture, whether the interrogation has taken place at home or abroad.

50. To ensure the total prohibition of torture by prohibiting torture and cruel, inhuman or degrading treatment, measures should be taken to ensure access to monitoring bodies to all prisoners in all places of detention, and to abolish places of secret detention. Further, Member States should abide by the principle of non-refoulement and refrain from returning persons to countries where they may face torture.

51. Member States are encouraged to ratify and implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol and the International Convention for the Protection of All Persons from Enforced Disappearance as important practical measures of good faith and meaningful commitment to preventing torture, ill-treatment and enforced disappearances.